

STATE OF NEW YORK

DIVISION OF TAX APPEALS

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In the Matter of the Petition	:	
of	:	
ANAMETRICS, INC.	:	DETERMINATION
for Redetermination of a Deficiency or for	:	
Refund of Corporation Franchise Tax under	:	
Article 9-A of the Tax Law for the Years 1979, :	:	
1980 and 1981.	:	

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Petitioner, Anametrics, Inc., 30 Rockefeller Plaza, New York, New York 10112, filed a petition for redetermination of a deficiency or for refund of corporation franchise tax under Article 9-A of the Tax Law for the years 1979, 1980 and 1981 (File No. 801768).

A hearing was held before Joseph W. Pinto, Jr., Administrative Law Judge, at the offices of the Division of Tax Appeals, Two World Trade Center, New York, New York, on December 8, 1987 at 9:15 A.M. Petitioner appeared by Steven C. Feinman, CPA. The Audit Division appeared by William F. Collins, Esq. (Anne W. Murphy, Esq., of counsel).

ISSUE

Whether the gain or loss from the sale of precious metal contracts was investment or business income.

FINDINGS OF FACT

1. Petitioner, Anametrics, Inc. (hereinafter "Anametrics"), was in the business of providing financial advisory services, including a newsletter, to its clients. Anametrics frequently invested for its own account in various securities and other investment devices. During the years in issue, 1979, 1980 and 1981 (hereinafter the "audit period"), and specifically in 1979 and 1980, Anametrics purchased and sold contracts for gold and silver. It reported the gain or loss from the sales of these contracts on Schedule D of its Federal Form 1120, United States Corporation Income Tax Return, for the respective years.

2. During the course of the audit, petitioner executed two consents extending the period of limitation for the assessment of tax under Article 9-A for the years 1979 and 1980 until December 31, 1984.

3. On November 2, 1984, the Audit Division issued to Anametrics three statements of audit adjustment based upon a field audit of petitioner's books and records. One Statement of Audit Adjustment was issued for each of the years in the audit period. The statements contained the following explanations:

Period Ended	Period Ended	Period Ended
12/31/79	12/31/80	12/31/81

Tax per audit	\$1,859.00	\$61,721.00	\$4,249.00
Tax per report	1,218.00	31,730.00	3,783.00
Deficiency	614.00 [sic] <sup>1</sup>	29,991.00	466.00

The Statement of Audit Adjustment issued for the year 1979 set forth a tax deficiency of \$641.00 and interest of \$417.00, for a total of \$1,058.00. For the year 1980, the Statement of Audit Adjustment set forth a tax deficiency of \$29,991.00 and interest of \$16,593.00, for a total of \$46,584.00. For the year 1981, the Statement of Audit Adjustment set forth a tax deficiency of \$466.00 and interest of \$186.00, for a total amount due of \$652.00.

4. On November 2, 1984, the Audit Division issued three notices of deficiency to Anametrics which set forth the following amounts of tax and interest due for each of the periods:

<u>Period Ended</u>	<u>Tax</u>	<u>Interest</u>	<u>Total Due</u>
12/31/79	\$ 641.00	\$ 417.00	\$ 1,058.00
12/31/80	29,991.00	16,593.00	46,584.00
12/31/81	466.00	186.00	652.00

5. Petitioner disputes only that portion of the deficiency which was based upon the Audit Division's disallowance of petitioner's inclusion of its gain or loss from the sales of metals contracts in computing its investment income for the years 1979 and 1980. Said disallowance was a result of the Audit Division's conclusion that metals contracts do not fall within the definition of "other securities" as that term is defined in the regulations and, therefore, the gain or loss from said sales should be excluded from investment income or loss and included in business income or loss.

#### SUMMARY OF PETITIONER'S POSITION

6. It is petitioner's position that it does not trade, distribute or buy metals for manufacturing or any other like purpose; that it invests regularly in stocks, bonds and other securities, corporate and governmental, not held for sale to customers in the regular course of business; and that these investments are not inventory assets or used in its trade or business. Petitioner claims that metals contracts are purchased in the open market or in exchange transactions which are regulated by the United States government. Further, since petitioner is in the financial advisory and financial public relations business, and not in the business of metals trading, gains or losses on sales of metals contracts should be included in investment income and not business income. It is petitioner's position that the Audit Division's interpretation of the definition of investment capital and investment income is too narrow, particularly in light of the

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<sup>1</sup>Schedule A of the field audit report submitted in evidence as the Department's Exhibit "H" indicates that the correct deficiency for the period ended 12/31/79 was calculated to be \$641.00, which also corresponds to the amount of the deficiency set forth at the top of the Statement of Audit Adjustment and also on the Notice of Deficiency. It appears that the statement of "\$614.00" in the explanation was a mere transposition of numerals.

multitude of investment vehicles available to the investing public.

## CONCLUSIONS OF LAW

A. Tax Law § 208 (former[5]) provided, in pertinent part, as follows:

"The term 'investment capital' means investments in stocks, bonds and other securities, corporate and governmental, not held for sale to customers in the regular course of business, exclusive of subsidiary capital and stock issued by the taxpayer, provided, however, that, in the discretion of the tax commission, there shall be deducted from investment capital any liabilities payable by their terms on demand or within one year from the date incurred, other than loans or advances outstanding for more than a year as of any date during the year covered by the report, which are attributable to investment capital".

Tax Law § 208.6 defines "investment income" as "income, including capital gains in excess of capital losses, from investment capital, to the extent included in computing entire net income...", with certain limitations not applicable herein.

B. The regulation at 20 NYCRR 3-4.2 provides, in relevant part, as follows:

"(a) The term investment capital means the total of the average fair market value of the taxpayer's investments in stocks, bonds and other securities issued by any corporation (other than the taxpayer, a subsidiary or a DISC) or by the United States, any state, territory or possession of the United States, the District of Columbia, or any foreign country, or any political subdivision or governmental instrumentality of any of the foregoing.

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"(c) The other securities referred to in subdivision (a) of this section are limited to securities issued by governmental bodies and securities issued by corporations of a like nature as stocks and bonds, which are customarily sold in the open market or on a recognized exchange, designed as a means of investment, and issued for the purpose of financing corporate enterprises and providing a distribution of rights in, or obligations of, such enterprises. Thus other securities include debentures, notes of a type commonly dealt in upon securities exchanges or markets or commonly dealt in as a medium for investment, and certificates of indebtedness which have many of the essential characteristics of bonds, and certificates of interest and other instruments evidencing proprietary rights in corporate enterprises which have many of the essential characteristics of stock. They do not include corporate obligations not commonly known as securities, such as real property bonds and mortgages, chattel bonds and mortgages, contracts of sale, purchase money obligations, short-term notes acquired in the ordinary course of trade or business for services rendered or for sales of property which is primarily held for sale to customers, bills of lading, bills of exchange, bankers' acceptances and other commercial instruments."

C. Although the precious metal contracts in question were sold in the open market or on a recognized exchange, they were not issued for the purpose of financing corporate enterprises and providing a distribution of rights in, or obligations of, such enterprises. The contracts do not exhibit the essential characteristics of bonds or the proprietary rights in corporate enterprises which are the essential characteristics of stock. They are merely executory contracts of sale which entitle the holder to purchase a specific commodity, herein gold or silver, at an agreed upon price at a future date. They are not securities and thus not includible within the definition of investment capital as provided in 20 NYCRR 3-4.2.

This analysis was utilized in Carret & Company, Inc. v. State Tax Commission, (Sup Ct, Albany County, March 3, 1988, Bradley, J.), wherein commodity futures contracts were determined not to be securities and not includible in the definition of investment capital. (See also, Matter of Pohatcong Investors, Inc., Tax Appeals Tribunal, December 1, 1988.)

D. In contrast, the analysis of the Appellate Division in Avon Products, Inc. v. State Tax Commission (90 AD2d 393) wherein the court held that bankers' acceptances met all the criteria set forth in the regulations with regard to "other securities", including that they are issued by foreign banks for the purpose of financing the enterprise of the issuing banks by providing a distribution of the obligations of such banks, cannot be applied to the instant matter. The precious metal contracts are not issued for the purpose of financing corporate enterprises and providing a distribution of rights in, or obligations of, such enterprises. Therefore, the Audit Division was correct in disallowing petitioner's characterization of the precious metals contracts as investment capital and the income derived therefrom as investment income, and in its recharacterization of the contracts as business capital and the income therefrom as business income.

E. The petition of Anametrics, Inc. is hereby denied and the three notices of deficiency issued on November 2, 1984 are hereby sustained, together with such additional interest as may be lawfully owing.

DATED: Albany, New York  
December 8, 1988

Jr. \_\_\_\_\_ /s/ Joseph W. Pinto,  
ADMINISTRATIVE LAW JUDGE